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No. 1098

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

SAM DeSTEFANO,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

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To The Honorable The Chief Justice And The Associate Justices Of The Supreme Court Of The United States:

The petitioner, Sam DeStefano prays that a Writ of Certiorari be issued to review the decision of the Appellate Court of Illinois, First District, affirming a judgment of conviction in the Circuit Court of Cook County, finding him guilty of conspiracy with the intent that the offense of perjury be committed, for which offense he was sentenced to a term of 3 to 5 years in the penitentiary (R. 2776-2786).[1]

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[1] "R." refers to the original Record of Proceedings in the trial court.

OPINION BELOW

The Opinion of the Illinois Appellate Court, First District, is reported in 85 Ill. App. 2d 274, 229 N.E. 2d 325 and is reprinted herein as Appendix A.

The Supreme Court of Illinois denied a Petition for Leave to Appeal without opinion, on November 28, 1967.

JURISDICTION OF THIS COURT

The date of judgment sought to be reviewed was entered on November 28, 1967, when the Petition for Leave to Appeal in the Supreme Court of Illinois was denied. This Petition for a Writ of Certiorari is filed within 90 days from said denial.

The jurisdiction of this court is invoked under Title 28, U.S. Code, Section 1257 (3) and Rule 22(1) of the rules of this court.

QUESTIONS PRESENTED FOR REVIEW

1. Is it not a violation of the Sixth Amendment to the Constitution of the United States for a court to amend an indictment as voted by the grand jury? Is the right to ". . . be informed of the nature and cause of the accusation . . ." as required under the Sixth Amendment a federally protected right to a defendant in a State proceeding?

2. In a case where wide and pervading publicity painted the petitioner in derogatory terms, was it not a violation of petitioner's right to due process of law to deny this motion to transfer the place of trial out of Cook County, Illinois? At the very least, should not the jurors have been sequestered and insulated from the daily prejudicial

newspaper publicity, as they were so sequestered and insulated in petitioner's first two trials in this matter?[2]

3. Was petitioner's right to a fair trial in accordance with the due process of law violated when the entire jury venire was contaminated because some of the jurors had served on a jury in a different court in a different case where the trial judge in that case alluded in derogatory terms to the petitioner here?

4. Where the prejudice of the trial judge has been demonstrated by means of a verified affidavit of petitioner and where the trial judge announced he was making a ruling to hold a competency hearing because of certain things he had read in the newspapers (although what the court alleged to have read was shown never to have existed in newspapers) was it not a violation of defendant's right to due process of law to be tried by a judge who demonstrated his prejudice before, during and after the trial?

(a) May a State conviction be sustained where the trial judge demonstrated his prejudice to order a competency hearing when the petitioner never appeared before him and where the court entered such an order on the basis of false or non-existent newspaper stories the court stated it had read?

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[2] The conviction from which the present petition stems took place in September, 1965. In January, 1965 defendant was first tried and convicted of the offense. The trial judge granted him a new trial because of misconduct of the prosecutor. The jury was sequestered from prejudicial publicity during this trial.

The case was retried before a different trial judge in March, 1965. This jury likewise was sequestered from adverse newspaper publicity. This second trial resulted in a hung jury, and a mistrial was declared.

The third trial took place before a third trial judge.

(b) Where the trial judge used a double standard to make his rulings—*i.e.*, where rulings had been made by the two previous judges in favor of the State, the trial court adhered to those rulings, but where the two previous judges in the previous trials had made rulings favorable to the petitioner, the trial judge made his own rulings adverse to the petitioner—were not petitioner's right to a fair trial in accordance with due process of law violated?

(c) Was not prejudice shown even after the trial when the court summarily denied the petitioner bail pending appeal, notwithstanding the meritoriousness of the points to be raised on appeal? One week later, upon application, the Supreme Court of Illinois granted bail appeal.

5. May a State conviction of conspiracy be sustained where there is no evidence in support thereof:

(a) Where there was no evidence of any agreement; therefore, there could be no conspiracy shown;

(b) Where there was no proof that an alleged conspirator testified falsely—ever?

CONSTITUTIONAL PROVISIONS INVOLVED

1. Sixth Amendment to the Constitution of the United States, which states, in pertinent part:

> "In all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation . . ."

2. The Fourteenth Amendment to the Constitution of the United States, which states, in pertinent part:

> ". . . nor shall any state deprive any person of . . . liberty . . . without due process of law . . ."

CONCISE STATEMENT OF THE CASE

(1) As a result of the action of the Illinois courts, petitioner's right under the Sixth Amendment to the Constitution of the United States to know the nature and cause of the accusation was violated. The indictment failed utterly to state the nature and cause of the accusation with reasonable certainty because it did not state the facts which composed the offense. This question was raised before the trial on petitioner's motion to dismiss the indictment, and raised thereafter in his motion in arrest of judgment after conviction. Similarly, the question was raised in the Appellate Court of Illinois, First District. That court ruled, for the first time in the proceedings, that certain essential allegations in the indictment were "surplusage" to which no proof was offered by the State. (See Op., Appendix A, p. 6).

(2) The Appellate Court, in amending the indictment, stated, "The defendant states and we agree, that there was a variance between the pleading and proof, but in our judgment, the complained of language was unnecessarily added in the indictment and was clearly surplusage." (Op., Appendix A, p. 6). The indictment charged the defendant with conspiracy in that he agreed with one Henrietta Burns that she should testify falsely in a certain trial of three persons accused of robbery committed in October, 1962. The object of the conspiracy, the commission of perjury is defined by Illinois Revised Statutes 1962, Chapter 38, Section 32-2 as follows:

> "(a) A person commits perjury when, under oath or affirmation, in a proceeding or in any other matter where by law such oath or affirmation is required, he makes a false statement material to the issue or point in question, which he does not believe to be true."

The indictment failed to allege that Mrs. Burns testified falsely "under oath or affirmation."

In addition, where the indictment charged that Mrs. Burns testified falsely in a trial "on July 2, 1963 in the Criminal Court before Judge Irving Landesman, one of the judges of that court, in the trial of Information No. 63-11, wherein the People of the State of Illinois were plaintiffs and Frank Santucci, Anthony Donato, and Robert Chessher were defendants on the charge of robbery committed October 5, 1962", and where the Appellate Court agreed that no proof was made of such charge in the indictment, but that the allegations were "surplusage" (Op. Appendix A, p. 6), there was nothing left in the indictment by which defendant was informed of the nature and cause of the accusation.

(3) The petitioner was denied due process of law when he was denied his motion for a change of place of trial. The newspaper publicity painting the defendant in derogatory terms contaminated the jurors who were not sequestered although such motion for sequestration was made by the petitioner and such motions were allowed in the first two trials held in connection with this matter. When the case was assigned to another trial judge to preside over the third trial, petitioner filed affidavits of prejudice on April 5, 1965 and on May 11, 1965 charging the inhabitants of the county with prejudice (R. 37-40, 117-126, 198-204, 236-243). Just prior to the commencement of the actual trial, the third time, in September, 1965, petitioner again moved for a change of place of trial and supported his motion with Exhibits (R. 254-279). The State filed counter-affidavits only in connection with the motions filed in May, 1965, (R. 245-249), but did not file

any counter-affidavits in September, 1965. The trial judge refused to sequester the jury, although so requested (R. 2245-7). The prejudicial publicity and colloquy thereon appears at R. 1717 to 1759.

In addition to the pretrial motions, petitioner preserved the constitutional question by raising the error in his motion for a new trial (R. 316). The question was likewise raised on appeal and decided adverse to the petitioner. (Op., Appendix A, p. 10).

4. The entire jury venire was contaminated under bizarre circumstances and should have been discharged. The motion to discharge the entire jury was made before the trial and was denied (R. 2087-2232). Petitioner refused to accept the jury (R. 2232). The error was made part of petitioner's motion for a new trial (R. 317-8). Similarly, it was raised as error in the Appellate Court. (Op., Appendix A, p. 10).

(5) The prejudice of the trial judge having been demonstrated by factual assertions in the verified petition, and not controverted, defendant was denied due process of law when the court failed to grant petitioner's motion for a change of judge. This issue was raised before the trial (R. 209-212) and after trial in a motion for new trial (R. 316).

When the case was assigned to Judge Nathan Cohen to preside over a third trial, that judge immediately ordered a competency hearing for the petitioner (R. 1693-1702). Petitioner had never appeared before the judge and was not in court at the time when the judge made his ruling. The State did not request such a hearing, petitioner objected to it and all previous judges had denied the State's motions for a competency heading (R. 1694); The court stated, "I have read somewhere in the newspapers, it

did not come to me from any other source, that this man was committed to Manteno at one time. Now, I may be wrong—" (R. 1699). The court was wrong; and petitioner's verified affidavit pointed out that, "In deciding that a hearing as to petitioner's competence was in order, Judge Cohen noted his supposed confinement in Manteno. Thus, as the matter stands, petitioner will never know during the course of his trial, nor will he ever be able to prove during the course of his trial, that the judge's rulings were not the product of prejudices precipitated from a private fund of misinformation obtained extra-judicially by Judge Cohen." (R. 1707).

Although the court denied the petition for a change of judges with respect to the trial in chief, he did allow a motion for a change of judge when petitioner charged him with prejudice with respect to the competency hearing (R. 1714-1716).

(6) There was a total insufficiency of evidence to support even the amended allegations of the indictment, as there was no evidence of any agreement and no proof that Mrs. Burns agreed with the defendant that she would testify falsely. This point was preserved on petitioner's motion for a directed verdict of acquittal at the close of the State's case (R. 2534-5) and at the close of all of the evidence (R. 2546), was raised again in petitioner's motion for judgment of acquittal notwithstanding the verdict made after trial (R. 316) and was, of course, raised on appeal (See Op. Appendix A. pp. 4-7).

It was the charge in the indictment that the petitioner conspired with one Henrietta Burns that she testify falsely during a robbery trial (R. 4-5). Mrs. Henrietta Burns, the chief witness for the State, testified that the petitioner, "never told me to lie or perjure myself. The sum of

$1,000.00 for the purpose of procuring my false testimony was not from Sam. Sam didn't give us the money for us to perjurize (sic) ourselves." (R. 2539).

She also testified that *before she spoke to the defendant or had gone to his home,* an officer had shown her a picture which "looked like the man that was in the tavern." She also told the Grand Jury in October 1962, *before she went to the home of the defendant*:

> "that I thought that the picture of the man identified to me as Chessher was the man in the tavern. That was the same testimony that I gave at the actual trial eight months later in July of 1963. When it came to the trial of Santucci, Di Donato and Chessher in July 1963, I was asked by the State's Attorney prosecuting the case the same questions the State's Attorney asked of me before the Grand Jury in October relative to Chessher. I answered just about the same way." (R. 2361).

She also stated on cross examination:

> "Even after I was threatened by the State's Attorney's office with a perjury indictment against me if I didn't testify against Sam DeStefano I testified in practically the same, exact manner that I testified at the first Grand Jury before I even talked [with] or saw Sam DeStefano." (R. 2369)

And further:

> "From the time when I saw the man to whom I served beer in the tavern on October 5, 1963, all I know is the picture shown to me and identified by Koop and Giosh as being Chessher looked like the same man.
>
> "I told the public authorities of this county that the picture looked like the man. I also said that I thought he was the man. On a number of occasions, I said he looked like and I thought it was the same man, before I even went to the home of Sam DeStefano." (R. 2390).

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

1.

Both the trial judge and the Appellate Court improperly amended the indictment as voted by the Grand Jury.

The Sixth Amendment to the Constitution of the United States, in pertinent part, states:

> "In all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation . . ."

The petitioner claimed before trial that the indictment was vague, indefinite, uncertain and insufficient to apprise him of the nature and cause of the accusation (R. 183-5). The indictment is set out in full at R. 4-5. It is different upon review here than it was at the time when defendant was put to trial because the Appellate Court has treated certain of the allegations as "surplusage". (Op., Appendix A, p. 6). Surplusage, because no proof at all was adduced as to the so-called "surplusage".

At it appears then, at this posture, petitioner cannot know the nature and cause of the accusation, and the accusation fails property to charge a crime.

The charge, essentially, is conspiracy; but conspiracy that Henrietta Burns agreed to testify falsely in the trial of three persons for a robbery committed in October 1962. The object of the conspiracy allegedly charged is set out in Chapter 38, Section 32-2, Ill.Rev.Stat., 1963 which states:

> "(a) A person commits perjury when, under oath or affirmation, in a proceeding or in any other matters where by law such oath or affirmation is required, he

makes a false statement material to the issue or point in question, which he does not believe to be true."

Thus, the essential element in the alleged conspiratorial agreement is that the witness had to swear falsely and that, in a trial, *an oath or affirmation was required.*

The indictment nowhere states that Henrietta Burns was under oath or affirmation. Describing the criminal offense which is the object of the conspiracy in the language of the statute itself is not always sufficient to the charge of criminal conspiracy. *People* v. *Isaacs,* 37 Ill.2d 205, 226 N.E.2d 38. In *Isaacs,* the Illinois Supreme Court held (March 29, 1967) that in the charge of conspiracy there it was not ascertainable from a reading of the indictment that the object of the alleged conspiracy was in fact criminal merely because the language of the statute was set out as being the object of the conspiracy. In the case at bar, there is less validity to the Appellate Court's holding that the count is sufficient where the indictment does not even set out the statutory object of the conspiracy which is, that "a person commits perjury *when under oath or affirmation,* . . ." he makes a false statement in a proceeding "where by law such oath or affirmation is required."

Although Judge Leighton, at the first trial, granted defendant's motion to dismiss Count 2, that court sustained the sufficiency of Count 1, but remarked that the draftsmanship left much to be desired. (R. 596-601). We wonder, however, whether that court would have sustained the allegations with the elimination of the "surplusage" which the Appellate Court determined certain of the essential allegations to be. With the allegation (totally unproved) that there was a trial "on July 2, 1963 in the Criminal Court before Judge Irving Landesman, one of

the judges of that court, in the trial of Information Number 63-11, wherein the People of the State of Illinois were plaintiffs and Frank Santucci, Anthony Donato and Robert Chessher were defendants on the charge of robbery committed October 5, 1962," etc. eliminated from the indictment, per the Appellate Court's ruling (Opinion, Appendix A, p. 6) there is nothing in the indictment which informs the defendant of the nature and cause of the accusation.

With the parts of the indictment eliminated as "surplusage", as set out in the second paragraph (R. 5), the indictment merely charges that the defendant conspired with Henrietta Burns and others that she testify falsely in a trial of three individuals for a robbery in which trial she would be a material witness. There is absent the requirement of the perjury statute that she testified "*in a proceeding or in any other matter where by law such oath or affirmation is required*". For all that appears in the now-emasculated indictment, the trial referred to could be a union hearing determining whether Santucci, Donato or Chessher should properly be members of a union. Or, for all that appears in the now-naked indictment, it could be a trial to determine continuing membership in a private club or organization. That is, "the nature and cause of the accusation" is now unknown to the defendant.

There also can be no perjury, or agreement to commit perjury, unless the perjury is committed at a trial or a proceeding where by law an oath or affirmation is required. That is not set out in the indictment. A host of other "trial" proceedings exist, some of which might require an oath or affirmation by law, and some of which might not.

We submit that even in the original sketchy and inept indictment, the *videlicet* was essential to the allegation.

When the Appellate Court held such was not necessary to be alleged (because it was not proved) the court, in effect, amended the indictment as voted by the grand jury.

This no court may do. *Stirone* v. *United States,* 361 U.S. 212; *Ex Parte Bain,* 121 U.S. 1.

And "Conviction on a charge not made would be sheer denial of due process." *DeJonge* v. *Oregon,* 299 U.S. 353, 362, 57 S.Ct. 255, 81 L.ed. 278, 282; *Cole* v. *Arkansas,* 333 U.S. 196, 201, 68 S.Ct. 514, 92 L.ed. 644, 647.

2.

The prejudicial publicity was so derogatory to the petitioner that petitioner could not have had a fair trial. The trial judge, though requested, and although two previous judges recognized the necessity for insulating the petitioner against unfavorable publicity, deliberately refused to sequester the jury.

Continuously, from the time he was indicted on September 3, 1964, the defendant filed motions to change the place of trial (R. 37-40; 117-121) setting forth that wide publicity about him in the Chicago newspapers would prejudice him in his right to a fair trial. His motions were accompanied by numerous newspaper exhibits.

On January 29, 1965, he moved for a change of venue out of the county because of adverse publicity. (R. 117-121) He attached to his motions 27 newspaper articles which were filed on February 3, 1965. (R. 127-153). Again, motions were filed before Judge Cohen on April 5, 1965 and on May 11, 1965 charging prejudice of the inhabitants of this county. (R. 198-204; 236-243). And just prior to the third trial in September 1965, the defendant again moved for a change of place of trial and supported the motion with exhibits. (R. 254-279)

The State filed counter-affidavits claiming the citizens of Chicago were not prejudiced (R. 245-251). But even the State's affidavits demonstrated that 20% of those called for jury duty in connection with the defendant's earlier trial admitted personal prejudice against the defendant, which could have been generated only because of the prevalent prejudicial publicity against him. (R. 251-253)

Further, on the trial of this cause, over 18% of the jurors interrogated admitted personal prejudice against the defendant, which could come only from the prejudicial publicity, none of the jurors having been personally acquainted with the defendant. (R. 1828-2241)

Just before the trial in September 1965, defendant again moved, by way of verified petition in accordance with the statute, for a change of place of trial and stated that ". . . within the past week newspaper publicity has been of such volume and intensity as to preclude the possibility of getting a fair trial before the citizens of this community. In addition the defendant has been the subject of considerable television and radio reportage in a manner prejudicial to his rights to a fair trial under the Constitution. Attached to the verified motion for a change of place of trial are a number of newspaper exhibits,[3] Exhibits A through W, if the court please." (R. 1745)

There were no counter-affidavits filed on the occasion of the last motion for a change of venue.

We submit that when 18% of prospective jurors admit prejudice against the defendant, without more, the trial should have been transferred to another county. Failing

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[3] Some excerpts from the prejudicial publicity appear at Record 1747-1755.

that, the court should have sequestered the jury as requested. (R. 2246-7) *Sheppard* v. *Maxwell,* 384 U.S. 333.

At the very least, the court should have inquired of the jurors on Friday morning September 10, 1965, whether any juror read or heard anything about the case. The defendant could not know, unless inquiry was made, whether the jurors followed the court's instructions not to read about the case. (R. 319) *United States* v. *Accardo,* 7 Cir., 298 F.2d 133.

As the court failed to insulate the jury from prejudicial publicity by failing to sequester them as requested, and as the court failed to inquire from the jurors whether they followed its instructions, petitioner was denied a fair trial in accordance with due process of law. *People* v. *Cain,* 36 Ill.2d 589, 224 N.E.2d 786. See also *United States* v. *Accardo,* 7 Cir., 298 F.2d 133 and *Sheppard* v. *Maxwell,* 384 U.S. 333.

As to this point, the Appellate Court said, "We have concluded, as did the trial judges, that while there was pre-trial publicity it did not establish reasonable grounds that the defendant could not obtain a fair and impartial trial." (Opinion, Appendix "A", p. 10) But the first two trial judges had concluded that it was necessary to insulate the jurors from newspaper publicity and radio and television reports *during the trial.* The jurors were sequestered in trials one and two, as they were not in the trial from which this appeal stems.

The general importance of this question and the need for the exercise of this court's authority to insure fairness to a defendant who, the record demonstrates, needed the court's protection from an onslaught of prejudicial publicity, is respectfully sought.

3.

Under bizarre circumstances here the entire jury venire was contaminated and should have been discharged. Petitioner's right to due process of law was violated when the court denied him two extra peremptory challenges which, at the very least, might have removed from the jury those contaminated.

During the selection of the first eight members of the jury it was necessary for petitioner to exercise two of his peremptory challenges against two jurors who announced they had served the week previous in the court room of another judge (Judge Friedlund) in a murder case where a verdict of manslaughter was returned. After eight jurors had been selected[4] and during the selection of the last panel, two prospective jurors stated that they also were members of the jury in Judge Friedlund's court *the week previous;* that after their verdict was returned Judge Friedlund spoke to the jurors informally in chambers; that in that informal talk he told them of the time when a jury in his court room returned a verdict of not guilty and how he, the judge, "bawled them out"; of how he tried a "rapist" in his court room who was a "strong man"; etc. Further examples are found at (R. 2003-7; 2034-40; 2070-2100; 2209). Judge Cohen refused to dismiss the jurors upon defendant's application for cause. This occurred shortly before noon recess on Wednesday, September 8, 1965. Those two jurors, not yet accepted or selected, went to lunch with the eight members of the jury already selected and with two other prospective jurors.

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[4] "The law is clear that reversible error follows when a good challenge for cause is overruled and peremptory challenges are exhausted." Gott v. People, 187 Ill. 249, 257.

Though the court initially declined to excuse those jurors for cause (R. 2040; 2078-86), after the noon recess Judge Cohen conceded the two jurors might be prejudiced by virtue of what happened in Judge Friedlund's chambers and accordingly discharged them for cause. (R. 2099) The trial judge also announced that he would excuse for cause any other juror who had served on the Judge Friedlund jury the week previous and, accordingly, two or three prospective jurors were excused for cause without even being questioned. The motion to dismiss the entire panel of eight jurors already selected because they were contaminated was denied. (R. 2122) A motion to allow defendant extra peremptory challenges because of his having to exercise two peremptory challenges before Judge Friedlund's lecture to the jurors was discovered, was likewise denied. (R. 2232)

> "Where a defendant is precluded from exhausting the peremptory challenges to which he is entitled, the intent of the legislature is frustrated." *People* v. *Webster*, 362 Ill. 226, 228.

Uniquely—and coincidentally—enough, Judge Friedlund was the same judge who had previously held the appellant in contempt of court.

The coincidence of the occurrence was as violative to defendant's right to a fair trial as anything that could possibly be imagined.

It is our respectfull submission that the Appellate Court avoided *in toto* a discussion of this important claimed error. All the court said was, "The voir dire selection in this case revealed that a fair and impartial jury was selected. Nor do we find that the entire venire was contaminated as charged by the defendant." (Opinion, Appendix, p. 10).

The bizarre circumstances which demonstrated jury contamination should be reviewed.

4.

The prejudice of the trial judge having been demonstrated by factual assertions in a verified petition, and not controverted, petitioner was denied due process of law when the court failed to grant his motion for a change of judge.

After defendant's second trial which resulted in a hung jury before Judge Finnegan, defense counsel appeared before Judge Cohen to whom the case had been transferred. Defendant filed certain motions: for a discharge for want of a speedy trial (R. 1672-3), for a change of place of trial (R. 1673) and a motion to quash the indictment. (R. 1673) The court stated that it would not rule on the motions because previous judges had ruled on those motions. (R. 1677) "I believe that would not be a subject for the ordinary process of this court to hear anew matters here by a judge in this court and ruled upon by." (R. 1679)

While defense counsel was presenting arguments in answer to the judge's question about where the case would be transferred in the event the court ordered a change of place of trial (R. 1692-3), the court decided, *sua sponte*, to order a competency hearing, notwithstanding that the State did not request it, the defendant objected to it *and previous judges had denied State's motions for a competency hearing.* (R. 1694)

The court stated that certain facts came to its attention, one of which was that, "This court recalls that there was a hearing which I think resulted in his being com-

mitted to Manteno in the past." (R. 1697) Counsel pointed out,

> "Your Honor is entirely erroneous about his ever being in Manteno. Where your Honor got that information is something unbeknownst to the attorney. Now, if your Honor has information coming to the court other than the newspapers, outside the presence of this courtroom, then your Honor may not hear the case and we respectfully move for a transfer from this court irrespective of whether or not this case moves from this county. Your Honor has made factual assertions that were wrong." (R. 1698)

The court then stated, "I have read somewhere in the newspapers, it didn't come to me from any other source, that this man was committed to Manteno at one time. Now, I may be wrong—" (R. 1699).

He was.

Being invited by the court to file an appropriate petition for a change of judge, the defendant did so on April 12, 1965, seven days after the above mentioned proceedings. The petition stated that Judge Cohen "revealed an intention to employ different standards of interpretation in the trial of this case, depending upon which side urges the proposition to be ruled upon." (R. 1703) There was further set out in the petition that the court took it upon himself to learn "facts of and concerning your petitioner by conducting private extra-judicial investigations." (R. 1705) And that such investigations, from whatever source, culminated in the court having received false information that defendant had at one time been confined in an institution for the mentally incompetent in Manteno. Defendant pointed out in his petition that it was a matter of particular concern that the judge entertained false notions

of and concerning him because the court demonstrated a willingness to act, *sua sponte,* " . . . quite as readily upon false information privately obtained, as he would upon matters revealed by testimony in the courtroom." (R. 1706-7)

Thus, the petition pointed out that, "In deciding that a hearing as to petitioner's competence was in order, Judge Cohen noted his supposed confinement in Manteno. Thus, as the matter stands, petitioner will never know during the course of his trial, nor will he ever be able to prove during the course of his trial, that the judge's rulings were not the product of prejudices precipitated from a private fund of misinformation obtained extra-judicially by Judge Cohen." (R. 1707)

The court denied that petition.

But another petition charging the court with prejudice in the competency trial ordered by the court was allowed, on the theory that the petition of prejudice was made within ten days from April 5, 1965, the date when the court ordered the competency hearing. (R. 1714-16)

We respectfully urge a review of the trial court's rulings in this connection as, from our research, this point appears to be one of first impression. That is, can there be bifurcated prejudice with respect to a defendant who has more than one legal matter before the court? Can the court admit of prejudice because the statute requires him so to do, and yet deny a substitution of judge where prejudice is claimed in a petition, supported by affidavit, setting out specific facts and instances of prejudice, all in accordance with a state statute? (Sec. 114-5, Chap. 38, Ill. Rev. Stat. 1965)

And as was stated in the petition charging prejudice, the defendant could never know whether certain discre-

tionary rulings made during the course of trial were motivated by the court's prejudice against him.

But certain areas of prejudicial ruling were demonstrated in the record. For example, although the court announced it would not rule differently on matters decided by the two judges who conducted the two previous trials, Judge Cohen did order a competency hearing on his own motion where *all* judges (four) previously refused the State's motion for such hearing. Also, Judge Cohen would not entertain any arguments with respect to certain legal matters, such as a dismissal of the indictment; but, the judge overruled the previous judges in refusing to give defense tendered instructions relating to its theory of the case, notwithstanding that it was pointed out both Judges Leighton and Finnegan gave such instructions. Instructions are the law of the case. But of course, the instructions given in previous trials were *favorable* to the defendant.

By this means petitioner was deprived of his right to a fair trial by due process of law. A judge who harbors prejudicial notions against a defendant is the very antithesis of fairness and impartiality.

5.

There was a total insufficiency of evidence to support even the amended allegations of the indictment as there was no evidence of any agreement and there was no proof that Mrs. Burns agreed with the petitioner that she would testify falsely.

Petitioner recognizes that an argument on weight of evidence should not properly be presented to this court and is not grounds for the grant of the relief requested.

But a total insufficiency or absence of relevant evidence to sustain the charge is grounds for the grant of this court's Writ of Certiorari. *Heikkinen* v. *United States,* 355 *U.S.* 273, 78 S. Ct. 299, 2 L. ed. 2d 264; *Garner* v. *Louisiana,* 368 U.S. 157, 82 S.Ct. 248, 7 L. ed. 2d 207; *Thompson* v. *City of Louisville,* 362 U.S. 199, 80 S. Ct. 624, 4 L. ed. 2d 654, 80 A.L.R. 2d 1355.

An analysis of the evidence, then, is necessary.

The alleged illicit conspiratorial agreement was never proved. First, the State dismissed the charges against alleged co-conspirator Charles Grimaldi (R. 641-700) There was no evidence presented that Grimaldi was a conpirator.

The next question then is whether the defendant agreed with Mr. and Mrs. Burns and Mr. and Mrs. McCluskie "and with other persons whose names are unknown to the said grand jurors to the commission of the offense of perjury" (R. 4-5). With respect to alleged "unknown persons", the State does not claim it presented any evidence.

With respect to the *agreement* with Mrs. Burns, upon whose testimony the State relied entirely to prove an "agreement" with the defendant, Mrs. Burns testified that she knew the defendant previously. After she was held up in a tavern by two men whom she could not identify she was shown pictures by the police. She could not identify Santucci or Donato, but told the police one of the pictures "looked like" a man, Chessher, who was in the tavern about an hour before the robbery, drinking beer. When she visited the home of the defendant, he told her that he had been contacted by Santucci who offered to return $ 1,000 of the money taken in the robbery

if she would not positively identify any of the men connected in the robbery (R. 2348). The defendant told her that they could make up their own minds what they wanted to do, whether to accept the money and not make positive identification (R. 2348). She told the defendant that she had recognized a picture of Chessher and defendant said it was all right to say it "looked like" the man, so long as it wasn't a positive identification (R. 2349). On a later occasion, her husband accepted $1,000.

Accordingly, the evidence is clear that there was no agreement that Mrs. Burns perjure herself. She had already testified in the grand jury *before she went to defendant's house* that the picture shown her "looked like" the man who was in the tavern *prior to the robbery.* (R. 2368). That was the same testimony she gave at the trial against Chessher in July, 1963. When she was shown the picture by the police officers, before she went to the defendant's home, she also told them that the picture "looked like" the man she saw in the tavern before the robbery (R.2361). As there was no agreement between her and the defendant that she testify falsely in any way, as she testified at the trial against Chessher in the same manner as she had testified before the grand jury even before she ever spoke to the defendant about the matter, there could be no conspiratorial agreement to commit the offense alleged in the indictment.

The evidence is absent that Mrs. Burns agreed to testify falsely in any manner. She repeatedly testified that the defendant did not tell her to lie and that he never told her to perjure herself. (R. 2359-2369). She also testified that the defendant "did not offer me any money to change my testimony at that time. This is true." (R. 2370) She further testified that the defendant told her he did not even know the person Chessher.

"Sam DeStefano didn't tell me to lie. Sam DeStefano never gave or offered me any money for the purpose of my committing perjury, perjury wasn't mentioned. He never asked me to lie. He said it didn't matter to him what our choice was. There was no agreement with me that I should lie. I just wasn't to give the positive identification.

"I did not lie in the trial in July of 1963." (R. 2375).

Thus, there was no proof that she agreed with the defendant that she would testify falsely. But most important, the witness stated that she never testified falsely in the trial against Chessher. *She had, in fact, testified in the exact same manner she testified in the grand jury before she ever saw, met or discussed the matter with the defendant.*

With respect to the allegation in the indictment that Mrs. Burns testified falsely to a material issue "in the trial of Information Number 63-11 wherein the People of the State of Illinois were plaintiffs and Frank Santucci, Anthony Donato and Robert Chessher were defendants on the charge of robbery . . ." (R. 4-5), there is no disputation by the State or by the Appellate Court that the State did not offer any proof of that charge in *this* trial. The Appellate Court stated, (Appendix A, p. 6), "The defendant states and we agree, that there was a variance between the pleading and proof . . ." But the court held that allegation to be mere "surplusage".

Perhaps the reason the State attempted no proof was the imbroglio occasioned when the clerk of the court, in the first trial, attempted to change records while the prosecutor was present in the clerk's room, but without his permission, direction or knowledge. But, as previously ar-

gued (see Point I), the allegation was essential for appropriate jurisdiction. Otherwise the "trial" could be in a proceeding where no oath or affirmation were required. And we point out again, there was no allegation anywhere in the indictment, even with the "surplusage removed, that oath or affirmation was required as the statute provides.

The question here is of general importance to the proper administration of criminal law. We respectfully pray this court grant review on this question.

Conclusion

Petitioner prays this court's Writ of Certiorari be issued on all, or anyone of the grounds set out.

Respectfully submitted,

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